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No. 91-212

In the Supreme Court of the United States

OCTOBER TERM, 1991

WESTERN PALM BEACH COUNTY FARM BUREAU, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in an interlocutory appeal from the district court's denial of petitioners' motion to intervene, the court of appeals erred by declining to rule on petitioners' contention, raised for the first time in a filing made after the court of appeals issued its opinion in this case, that this suit was barred on sovereign immunity grounds.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A20) is reported at 922 F.2d 704. The order of the court of appeals denying petitioners' "Suggestion and Motion as to Lack of Jurisdiction" (Pet. App. A24-A25) is not reported. The district court orders denying petitioners' motions for intervention are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1991. A petition for rehearing was denied on May 7, 1991 (Pet. App. A30). The petition for a writ of certiorari was filed on August 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from an action brought by the federal government to require agencies of the State of Florida to take certain steps to end pollution in the Arthur R. Marshall Loxahatchee Wildlife Refuge and the Everglades National Park.

1. The Loxahatchee Wildlife Refuge is a federal wildlife sanctuary managed by the U.S. Fish and Wildlife Service, an agency of the Department of the Interior. Most of the refuge land is leased under a long-term lease signed on June 8, 1951, from the South Florida Water Management District (SFWMD), a state instrumentality that is one of the defendants in this case. Pet. App. A49-A50, A63-A72.

The Everglades National Park is federally owned and administered by the National Park Service, an agency of the Department of the Interior. In 1934 Congress authorized the establishment of the Park and provided that it be permanently reserved as wilderness in which no activity may be undertaken that would interfere with preservation of the native flora and fauna and primitive natural conditions. 16 U.S.C. 410(c). A 1970 congressional report described the Park as the "largest and most important subtropical wilderness in North America" that "contains perhaps the most fragile and unique plant and animal communities in the national park system." H.R. Rep. No. 1455, 91st Cong., 2d Sess. 2-3 (1970). The Report recognized that the Park's ecosystem is dependent on, and sensitive to, the water quantity and quality flowing into the park. *Ibid.*

2. On October 11, 1988, the United States brought this action against two Florida state agencies, the Florida Department of Environmental Regulation (DER) and the SFWMD, and against two state offi-

cials in their official capacity, the Secretary of DER and the Executive Director of SFWMD. Pet. App. A34-A37. An amended complaint, filed on December 23, 1988, was the basis for the court of appeals' decision.[1] Pet. App. A4 n.1. The complaint alleges that the hallmark characteristic of the Everglades aquatic ecosystem is the need for nutrient-lean conditions, and that aquatic life and vegetation, which are essential to preservation of the ecosystems in the Refuge and Park, are being destroyed because the state defendants, in violation of state law and of contracts with the federal government, have diverted nutrient-polluted agricultural water into, or toward, the fragile Everglades ecosystems in the Park and Refuge. Pet. App. A36-A41.

The complaint contains four counts. Count 1 (Pet. App. A42-A45) alleges that existing state water quality standards are being violated.[2] Count 1 fur-

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[1] The United States later filed a second amended complaint. This brief will refer to the first amended complaint, on which the court of appeals based its decision. In any event, the changes made in the second amended complaint are not material to the issues presented in this petition.

[2] Water quality standards applicable to the Park and Refuge include numeric and narrative Class III water quality standards, which were promulgated in 1972, F.A.C. 17-3.121, and an antidegradation standard based on designation of the Park and Refuge as "Outstanding Florida Waters" (see note 4, *infra*). In addition, the Surface Waters Improvement and Management Act of 1987 ("SWIM Act"), Fla. Stat. Ann. §§ 373.451-373.456 (West 1988 & Supp. 1991), provided that SFWMD shall not divert waters to the Park in such a way that state water quality standards would be violated or nutrients in diverted waters would adversely affect native vegetative communities or wildlife. Fla. Stat. § 373.4595(2)(a)1 (West 1988); Pet. App. A43.

Although four years have passed since the SWIM Act was enacted, the state defendants have not yet produced an ap-

ther alleges that both DER and SFWMD have the power and responsibility under Fla. Stat. chapters 373 and 403, to enforce state water quality standards, including the power to issue and enforce permits to ensure that waters are protected in accordance with state regulations.[3]

Count 2 (Pet. App. A45-A47) alleges that DER's failure to require permits for the structures operated by the SFWMD, and SFWMD's operation of unpermitted structures, violates state law.[4] See Fla.

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proved, final SWIM plan. The SWIM Act was supplemented by the Florida Legislature's recent enactment of the Marjory Stoneman Douglas Everglades Protection Act, Fla. Stat. Ann. § 373.4592 (West Supp. 1991), which became effective on July 1, 1991 and, among other things, sets more specific requirements for the Plan and sets schedules for completion of and compliance with the Plan.

On July 26, 1991, the United States and the state defendants executed a settlement agreement resolving all of their respective claims in this case, and a motion for approval of the agreement is presently pending before the district court. The settlement agreement between the state defendants and United States requires completion of the SWIM Plan on a schedule consistent with the 1991 Act.

[3] Florida Stat. Ann. § 403.412 (West 1988 & Supp. 1991) provides that a governmental agency charged with the duty of enforcing the laws, rules, and regulations for the protection of water and other natural resources may be compelled to enforce such laws, rules, and regulations in an action for injunctive relief. The DER has supervisory authority over five regional water management districts, including the SFWMD, *id.* § 373.026, but delegates much of its power to those districts. *Id.* § 373.069.

[4] In 1979 the State designated the Park and Refugee as "Outstanding Florida Waters." As a result, Florida law prohibits the lowering of the ambient water quality below the quality that existed prior to 1979. F.A.C. 17-3.041, 17-4.242 (1) (a) 2.d. Notwithstanding the establishment of this water quality standard, commencing in 1979 the state defendants

Stat. Ann. ch. 403 (West 1988) and F.A.C. ch. 17-4. The second count also alleges that SFWD's delivery of contaminated water to the Park and Refuge through unpermitted structures constitutes a nuisance for which relief may be granted.

Count 3 alleges breach of a 1984 contract between the SFWMD, the National Park Service, and the United States Army Corps of Engineers. Pet. App. A47-A49, A54-A62. In the contract, SFWMD promised that water it sends to Everglades National Park would meet certain minimum, numerical water quality standards. Pet. App. A54, A58-A59. The contract also requires SFWMD to comply with state or federal quality criteria that are more stringent than the enumerated minimum levels. Pet. App. A54-A55. Finally, it requires SFWMD to take legal action where necessary to restore or protect the quality of water entering the Park. Pet. App. A55.

Count 4 is another contract claim, based on the lease agreement between SFWMD and the United States for use of state-owned land as a federal wildlife refuge. Pet. App. A49-A50, A63-A64. The contract provides that the Refuge shall be used in a manner consistent with wildlife management. Pet. App. A49-A50. The complaint alleges that SFWMD has breached the contract by diverting nutrient-polluted water, which is degrading the habitat necessary for conservation of wildlife, fish and game. Pet. App. A50.

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began diverting more contaminated water directly into the Refuge and toward the Park. Pet. App. A40. The court of appeals viewed the allegation that state defendants have violated the water quality standards applicable to "Outstanding Florida Waters" as part of Count 2, a claim as to which petitioners were not allowed to intervene. Pet. App. A8.

The complaint seeks injunctive relief to compel the state defendants to regulate the quality of water flowing onto federal property to the extent mandated by state law. It also seeks to compel performance of the contractual obligations alleged in Counts 3 and 4. Pet. App. A50-A51.

4. On December 16, 1988, petitioners and other parties, known collectively as "Farm Interests," [5] filed a motion to intervene as of right under Federal Civil Procedure Rule 24(a) or, in the alternative, to be granted permissive intervention under Rule 24(b). Farm Interests consisted of individual farms and organizations whose members farm in an area known as the Everglades Agricultural Area. The district court denied the motion to intervene by order entered on July 27, 1989. Farm Interests filed a notice of appeal from the order denying them intervention on September 25, 1989. On the same day, Farm Interests filed a renewed motion for intervention in the district court, which the court denied on December 1, 1989. Farm Interests filed another notice of appeal from this second denial of intervention. The two appeals were consolidated.

The only issue addressed in the appellate briefs and at oral argument was whether Farm Interests should be allowed to intervene in the case. In an opinion issued January 28, 1991, a divided panel of the Eleventh Circuit first held that it had jurisdiction over this interlocutory appeal, relying on what it termed the "anomalous rule" of the Eleventh Circuit that a court of appeals has jurisdiction over an interlocu-

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[5] The other parties were Florida Fruit and Vegetable Growers Association, Florida Sugar Cane League, Inc., and Beardsley Farms, Inc.

tory appeal of a district court order denying intervention only if the district court order is incorrect. Pet. App. A4-A5 (citing *Weiser* v. *White*, 505 F.2d 912, 916 (5th Cir.), cert. denied, 421 U.S. 993 (1975)). The court proceeded to reverse the district court in part, holding that Farm Interests had a limited right to intervene as to Count 1 with regard to the setting of numeric limits implementing state narrative water quality standards. Pet. App. A7-A14. Judge Hatchett filed a dissenting opinion stating that he would affirm the district court's denial of intervention in full. Pet. App. A19-A20.[6]

On February 19, 1991, Farm Interests filed a petition for rehearing as to that portion of the decision denying intervention of right as to Counts 2, 3, and 4. Farm Interests simultaneously filed a pleading styled "Suggestion and Motion as to Lack of Federal Jurisdiction," in which they asserted, based on a variety of arguments, that the district court proceedings should be dismissed. (Pet. App. A24) Among the contentions advanced by Farm Interests in this pleading were that the United States had no standing under state law to assert Counts 1 and 2, that the nuisance claim was barred by the Florida Right to Farm Act, Fla. Stat. Ann. § 823.14 (West Supp.

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[6] The court of appeals unanimously held that Farm Interests had no right to intervene on the other three claims in the United States' amended complaint. Pet. App. A14-A17. The district court's denial of permissive intervention under Fed. R. Civ. P. 24(b) was also unanimously affirmed. Pet. App. A18. The court of appeals emphasized that the district court retained discretion to condition Farm Interests' participation on Count 1 to such terms as would be consistent with the fair, prompt conduct of the litigation, or to order separate trial and discovery of one or more of the counts. Pet. App. A14, A17.

1991), and federal Clean Water Act, 33 U.S.C. 1251 *et seq.*, and that constitutional principles of comity, federalism, and state sovereign immunity embodied in Article III and the Tenth and Eleventh Amendments of the Constitution, required dismissal of all counts, including those counts as to which they had not been granted a right to intervene.

By order dated March 22, 1991, the Eleventh Circuit panel declined to consider the Farm Interests' "Suggestion and Motion as to Lack of Jurisdiction." Pet. App. A24-A25. The Court explained that, although "the Farm Interests may intervene in this case to protect their right to participate in the development of numeric limits implementing the state's narrative water quality standards * * *, [t]he jurisdictional issues that the Farm Interests raise in their motion are only indirectly related to the protection of this right." Pet. App. A24-A25. The court noted that "the Farm Interests are adequately represented on the jurisdictional issues by defendants South Florida Water District and Florida Department of Environmental Regulation, which have already raised many of these issues with the District Court." Pet. App. A25. Finally, the court held that, "even if the Farm Interests were proper parties to raise the jurisdictional issues in their motion, it would be procedurally inappropriate for us to extend our limited appellate review under the anomalous rule to decide issues not raised in the parties' briefs or in this Court's published opinion." *Ibid.* The court noted, however, that "[t]he Farm Interests may still seek to present their jurisdictional motion to the District Court." *Ibid.*

ARGUMENT

Petitioners do not seek further review of the Eleventh Circuit's decision respecting the scope of their right to intervene. Rather, petitioners argue that the court of appeals erred in failing to consider their post-decision motion to dismiss all four counts in the complaint for lack of jurisdiction.

Contrary to petitioners' contention, no decision of this Court or any other court of appeals holds that a court of appeals has an obligation to rule on a post-decision motion raising jurisdictional issues that exceed both the scope of the moving party's right to participate as an intervenor and the scope of an interlocutory appeal. Moreover, even if the court of appeals had an obligation to rule on petitioners' motion, petitioners' substantive contentions that the district court has no jurisdiction over this case are mistaken; settled precedent makes clear that a State has no Eleventh Amendment immunity from suit in federal court where jurisdiction is based on the presence of the United States as plaintiff.

1. Further review in this case is unwarranted because the court of appeals acted appropriately in refusing to rule on issues that were "not raised in the parties' briefs or in [the court of appeals'] published opinion" (Pet. App. A25), but instead were raised for the first time in petitioners' post-decision motion. The Federal Rules of Appellate Procedure provided ample opportunity for petitioners to submit a timely brief advancing "the contentions of [petitioners] with respect to the issues presented, and the reasons therefor." Fed. R. App. P. 28(a)(4). In addition, they were permitted to file a reply brief pursuant to Fed. R. App. P. 28(c) and to participate in oral

argument pursuant to Fed. R. App. P. 34. Petitioners chose not to use any of those mechanisms to present their jurisdictional arguments to the court of appeals. Petitioners advance no authority in support of the novel proposition that the court of appeals was required to ignore rules adopted for the orderly disposition of appeals and rule on their untimely arguments.

2. Even had petitioners chosen to advance their arguments in an orderly and timely manner before the court of appeals, the court of appeals would have acted correctly in refusing to exercise its pendent appellate jurisdiction to rule on petitioners' arguments.[7] Under the final judgment rule, the courts of appeals "have jurisdiction of appeals *from all final decisions* of the district courts." 28 U.S.C. 1291 (emphasis added). Thus, a district court's rulings on preliminary issues—including jurisdictional issues of the sort raised by petitioners—are not appealable until final judgment is reached. The fact that the court of appeals may have properly exercised its jurisdiction to review the limited issue of the district court's denial of Farm Interests' initial motion to intervene, cf. *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 376-377 (1987), does not alter the fact that other rulings of the district court, including its determination that it had jurisdiction over this case, were not yet appealable. Thus, as petitioners themselves recognized in their motion to the Eleventh Circuit, see Mot. 3 n.2, consideration of their

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[7] Indeed, petitioners apparently contend that the court of appeals was required to rule on their motion to dismiss not only with regard to Count 1, as to which the court of appeals granted them a limited right of intervention, but also as to Counts 2, 3, and 4, as to which they are not parties.

motion to dismiss the case for lack of jurisdiction was, at best, dependent on the court of appeals' choosing, in its discretion, to exercise pendent appellate jurisdiction over otherwise nonappealable jurisdictional issues in conjunction with review of the appealable intervention issue.

This was not an appropriate case for the exercise of pendent appellate jurisdiction. Because pendent appellate jurisdiction provides an exception to the finality requirement for appellate review, it has been exercised by the courts of appeals only in extraordinary circumstances. See *Akerman* v. *Oryx Communications, Inc.*, 810 F.2d 336, 339 (2d Cir. 1987). The factors that have informed the courts of appeals' exercise of discretion to assume pendent appellate jurisdiction overwhelmingly counsel against exercise of such jurisdiction in this instance. For example, there was no overlap of appealable and nonappealable issues in this case. See, *e.g.*, *Howard* v. *Parisian, Inc.*, 807 F.2d 1560, 1565 (11th Cir. 1987); *People of Illinois ex rel. Hartigan* v. *Peters*, 861 F.2d 164, 166 (7th Cir. 1988). In addition, the record on appeal was insufficient to decide the jurisdictional issues, as illustrated by the fact that Farm Interests based its motion in part on an appendix to its motion papers containing materials that were not in the record on appeal and some of which were not in the district court record. See *Colorado* v. *Idarado Mining Co.*, 916 F.2d 1486, 1491 (10th Cir. 1990), cert. denied, 111 S. Ct. 1584 (1991). Finally, the court of appeals' decision not to rule on their motion leaves petitioners in precisely the same position they would have occupied had the district court permitted them to intervene in the first instance. Had the district court done so, they would have had no right to appeal an adverse district

court decision—even on a jurisdictional issue—until the district court issued a final judgment in the case.

Contrary to petitioners' contention (Pet. 12-13), the Eleventh Circuit's treatment of Farm Interests' motion is not inconsistent with this Court's statements that a court is obliged to examine the standing of parties to determine if Article III jurisdiction exists. See, *e.g.*, *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472 (1990) (amendment to statute at issue eliminated standing of appellee and rendered case moot); *Bender* v. *Williamsport Area School District*, 475 U.S. 534, 541 (1986) (vacating court of appeals decision because respondent had no standing to appeal); *Juidice* v. *Vail*, 430 U.S. 327, 331 (1977) (although not raised by the parties, "we are first obliged to examine the standing of appellees"). None of the cases cited by petitioners involved interlocutory appeals on limited issues. Moreover, none of those cases suggests, as petitioners would have it, that the rule requiring a court to notice jurisdictional defects obliges a court of appeals to disregard the final judgment rule and to exercise pendent appellate jurisdiction so as to rule prematurely on otherwise nonappealable issues.

3. Wholly apart from the fact that exercise of pendent appellate jurisdiction was inappropriate, petitioners have no standing to assert the sovereign immunity defenses they seek to raise. First, petitioners do not, and cannot, assert that they are entitled to sovereign immunity under the Eleventh Amendment or any other constitutional or statutory provision. Instead, petitioners seek to raise a sovereign immunity defense that is available only to third parties—the state defendants (who would be barred by the final judgment rule from presenting the question

to the court of appeals at this time). See, *e.g.*, *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961); *United States* v. *Raines*, 362 U.S. 17, 22 (1960). Moreover, their claims do not fall within any recognized exception to the general rule against third-party standing. See, *e.g.*, *Hodel* v. *Irving*, 481 U.S. 704, 711-712 (1987); *Eisenstadt* v. *Baird*, 405 U.S. 438, 443-446 (1972). Finally, petitioners' claim to third-party standing is particularly weak because their own right of intervention is narrow, limited only to Count 1.[8] As the court of appeals noted, the state defendants "have already raised many of [petitioners'] issues with the district court" (Pet. App. A25) and petitioners "are adequately represented on the jurisdictional issues by the [state] defendants." *Ibid.*[9]

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[8] Petitioners do not seek review of the court of appeals' determination that they are not entitled to intervene as to Counts 2, 3, and 4.

[9] The state defendants filed motions in the district court to dismiss this action on the following grounds: the United States had not in Counts 1 and 2 pled a viable cause of action under state law because the United States lacked standing to invoke the Florida Environmental Protection Act, Fla. Stat. Ann. § 403.412 (West 1988 & 1991), and because the subject matter was committed to the state defendants' discretionary authority; Counts 1 and 2 did not state causes of action under state or federal law; the claims did not present justiciable issues under Article III of the United States Constitution; the United States had not exhausted administrative remedies; the abstention doctrine required dismissal; the federal common law of nuisance, not state law, was applicable; and the agreements that were the subject of Counts 3 and 4 were not enforceable contracts under the governing federal law. The district court rejected all of those contentions by order entered January 12, 1990.

Petitioners accordingly have no standing to assert the State's sovereign immunity defenses.[10]

4. Finally, petitioners' substantive claim that the district court was without jurisdiction is mistaken. Article III, Section 2 of the Constitution provides that "[t]he judicial Power shall extend * * * to Controversies to which the United States shall be a Party."[11] In a long line of cases, this Court has held

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[10] Contrary to petitioners' contention (Pet. 14), it is petitioners' position in this Court, not the United States' claims in district court, which is most comparable to Eugene Diamond's status in *Diamond* v. *Charles*, 476 U.S. 54 (1986). In *Diamond* the petitioner, Eugene Diamond, was held to lack standing to defend in this Court the constitutionality of a state criminal statute. This Court concluded that only the State had standing to defend the constitutionality of its criminal statute. 476 U.S. at 64-67. The State acquiesced in the court of appeals' decision, however, and did not appeal to this Court. 476 U.S. at 63-64. In the absence of an appellant with standing on the issue presented, Diamond's appeal was dismissed for want of jurisdiction. 476 U.S. at 69, 71. Similarly, here only the State or its agencies and officials have a stake in protecting the State's alleged immunity from suit in federal court and such immunity, if it exists, is waivable by the State. Thus, if, as petitioners claim (Pet. 13), the state defendants acquiesced on appeal to federal jurisdiction, then *Diamond* would instruct that petitioners have no standing in this Court to raise such issues. Cf. *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 678 F.2d 470, 475 (3d Cir.), cert. denied, 459 U.S. 969 (1982) (entry of consent judgment was a waiver of immunity to federal court jurisdiction).

[11] Accordingly, 28 U.S.C. 1345 provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

that there is no constitutional barrier to Article III jurisdiction where the United States sues a State in federal court. As the Court has stated,

> [N]othing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has even been seriously supposed to prevent a State's being sued by the United States. The United States in the past has in many cases been allowed to file suits in this and other courts against States, see, *e.g.*, *United States* v. *Texas*, 143 U.S. 621; *United States* v. *California*, 297 U.S. 175, with or without specific authorization from Congress, see *United States* v. *California*, 332 U.S. 19, 26-28.

United States v. *Mississippi*, 380 U.S. 128, 140 (1965). See also *Nevada* v. *Hall*, 440 U.S. 410, 420 n.19 (1979); *Employees of the Dep't of Public Health & Welfare* v. *Dep't of Public Health & Welfare*, 411 U.S. 279, 286 (1973); *Monaco* v. *Mississippi*, 292 U.S. 313, 329 (1934) (federal jurisdiction of a suit by the United States against a State is inherent in the constitutional plan); *United States* v. *Minnesota*, 270 U.S. 181, 195 (1926).

Contrary to petitioners' contention (Pet. 14-16), neither *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), nor *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), is to the contrary. The Court's decisions in those cases were based squarely on the Eleventh Amendment, which, as the line of cases cited above has made clear, does not apply to suits brought by the United States. Moreover, the principle that Eleventh Amendment immunity does not extend to suits brought by the United States has been reiterated in cases decided since *Pennhurst* and *Atascadero*. For example, in

Pennsylvania v. *Union Gas Co.*, 491 U.S. 1, 11 (1989), the Court stated:

> [T]he Constitution presents no barrier to lawsuits brought by the United States against a State. For purposes of such lawsuits, States are naturally just like "any nongovernmental entity"; there are no special rules dictating when they may be sued by the Federal Government, nor is there a stringent interpretive principle guiding construction of statutes that appear to authorize such suits. Indeed, this Court has gone so far as to hold that *no* explicit statutory authorization is necessary before the Federal Government may sue a State.

As recently as last Term, in *Blatchford* v. *Native Village*, 111 S. Ct. 2578, 2582 (1991), this Court reaffirmed the principle that States waived their immunity against suits by the United States when they adopted the Constitution. See also *Welch* v. *Texas Dep't of Highways & Public Transportation*, 483 U.S. 468, 487 (1987); *West Virginia* v. *United States*, 479 U.S. 305, 311 (1987).

Petitioners' reliance (Pet. 15) on *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989), and *Gregory* v. *Ashcroft*, 111 S.Ct. 2395 (1991), is also in error. Both of those cases involved the question whether, as a matter of substantive law, federal statutes applied to the conduct at issue. No comparable question is presented by petitioners here. Rather, petitioners' argument is that state-law claims by the United States may be brought only in state court because no state or federal statute clearly provides that such state-law claims may also be brought in federal court. As we have shown, that argument is squarely foreclosed by this Court's decisions.

Finally, contrary to petitioners' suggestion (Pet. 14-15), Article III's grant of jurisdiction to the federal courts in suits in which the United States is a party is not limited to cases brought under federal law.[12] Article III jurisdictional requirements are satisfied by the mere presence of the United States alleging a justiciable controversy. The United States may bring state law claims, as well as federal law claims, in federal court under the jurisdiction conferred by Article III and 28 U.S.C. 1345.[13]

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[12] Petitioners err in their apparent assumption (Pet. 16) that all of the United States' claims are solely state law claims. As to the two contract claims, the right of the United States to seek redress for breach of duly authorized contractual transactions is a federal right, even though the applicable federal rule may select state law or general contract law principles. See, *e.g.*, *West Virginia* v. *United States*, 479 U.S. 305, 308-309 (1987); *Priebe & Sons, Inc.* v. *United States*, 332 U.S. 407, 411 (1947); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943).

[13] See, *e.g.*, *Loftin Cotton* v. *United States*, 52 U.S. 228, 231 (1850) (upholding United States' right to bring a civil action in federal court for trespass under state law against a person for cutting trees on public lands; the United States "may bring suits to enforce their contracts and protect their property, in the State courts, or in their own tribunals administering the same laws"); *United States* v. *California*, 655 F.2d 914, 918 (9th Cir. 1980) (the "federal government, of course may sue a state in federal court under any valid cause of action, state or federal"); *United States for and on behalf of Santa Ana Indian Pueblo* v. *University of New Mexico*, 731 F.2d 703, 705 (10th Cir.), cert. denied, 469 U.S. 853 (1984) (Constitution provided State no immunity from suit in federal court in action by United States for ejectment and trespass damages); *United States* v. *California*, 328 F.2d 729 (9th Cir.), cert. denied, 379 U.S. 817 (1964) (Constitution grants jurisdiction over civil actions brought by the United States against a State without specific consent regardless of the na-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ture of the controversy); *United States* v. *West Virginia*, 537 F. Supp. 388 (S.D. W. Va.), aff'd on other grounds, 764 F.2d 1028 (4th Cir. 1985), aff'd, 479 U.S. 305 (1987) (holding that in contract action brought by United States, State had no constitutionally protected immunity from suit in federal court). Cf. *United States* v. *Puerto Rico*, 551 F. Supp. 864, 865 (D. P.R.), aff'd, 721 F.2d 832, 833 (1st Cir. 1983) (the United States can invoke federal jurisdiction to challenge the Commonwealth's decision on a water quality permit; the United States is not required to seek redress in Commonwealth's administrative or judicial forums).

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